No. 173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

UNITED STATES SMELTING REFINING AND MINING COMPANY, DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, and UNION PACIFIC RAILROAD COMPANY, *Appellees*.

and

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY and AMERICAN SMELTING AND REFINING COMPANY, *Appellees*.

CONSOLIDATED CAUSES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF FOR APPELLEE, UNITED STATES SMELTING REFINING AND MINING COMPANY

CHARLES A. HORSKY
PAUL B. CANNON
HERBERT R. SILVERS
Attorneys for Appellee.

Of Counsel:
COVINGTON, BURLING, RUBLEE,
O'BRIAN & SHORB,
Washington, D. C.

INDEX

CITATIONS

Cases:

Constitution and Statutes:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 173

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

UNITED STATES SMELTING REFINING AND MINING COMPANY, DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, and UNION PACIFIC RAILROAD COMPANY, *Appellees*.

and

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY and AMERICAN SMELTING AND REFINING COMPANY, *Appellees*.

CONSOLIDATED CAUSES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF FOR APPELLEE, UNITED STATES SMELTING REFINING AND MINING COMPANY

OPINIONS BELOW

Neither the findings of fact and conclusions of law (R. 449-463) nor the opinion (R. 474-477) of the District Court has been reported. The District Court opinion refers

to, in part incorporates, and in part is based upon a previous opinion (R. 299-302) in a predecessor case also unreported.

The decree of the District Court permanently enjoins an order of the Interstate Commerce Commission directed against present appellee, the report relating to which is at 270 I. C. C. 385 (R. 315-321) (and one directed against American Smelting and Refining Company, the report relating to which is at 270 I. C. C. 359 (R. 364-375)). The previous decision of the District Court (R. 299-302) reversed an order of the Interstate Commerce Commission, the reports relating to which are at 266 I. C. C. 476 (R. 271-279) and 263 I. C. C. 749 (R. 330-341) (and an order the reports relating to which are at 266 I. C. C. 349 (R. 29-52) and 263 I. C. C. 719 (R. 55-85)).

JURISDICTION

A final decree permanently enjoining the order of appellant Interstate Commerce Commission (defendant below) was entered by the District Court of the United States for the District of Utah (sitting as a three-judge statutory court) on January 10, 1949 (R. 463-464). Appeals by the Interstate Commerce Commission and the United States were allowed by the District Court on March 7, 1949 (R. 465). Probable jurisdiction was noted on October 10, 1949 (R. 1403). Jurisdiction of the appeals is based upon the provisions of the Judicial Code as amended by the Act of June 25, 1948, 28 U. S. C. §§ 1253, 2101(b).

STATUTE INVOLVED

This case involves primarily Section 6(7) of the Interstate Commerce Act, 49 U. S. C. § 6(7), which reads as follows:

"No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

STATEMENT

A number of years ago the Interstate Commerce Commission instituted a proceeding known as Ex parte 104, *Practices of Carriers Affecting Operating Revenues or Expenses*. The Commission's general and original report on the aspect here involved—*Part II, Terminal Services*—is set out at 209 I. C. C. 11.

Subsequent thereto, particular investigations were had of a large number of individual industrial enterprises, and supplemental reports made on each. This consolidated cause concerns two separate, but related, investigations that were made of certain western non-ferrous metal smelters. One investigation related to the terminal practice at the Midvale smelter of the United States Smelting Refining and Mining Company. The second related to the terminal practices at

three smelters of the American Smelting and Refining Company. The present appellee is concerned, of course, only with the first of these two matters; this brief will deal only with it.[1]

Not only is there a long history of Commission investigations of and orders in terminal services in general, but also there is a very considerable history in the proceeding with which this appellee is here concerned—the lawfulness and propriety of the terminal service charges and practices of the Union Pacific and Denver and Rio Grande Western Railroads in the receipt and delivery of carload freight at the plant of the United States Smelting Refining and Mining Company at Midvale, Utah. The early procedures in this Midvale proceeding, which began in 1944, need not be detailed; suffice it to say that following a hearing, and arguments and reargiments before the Commission, the Commission issued an order dated October 14, 1946 (R. 283-284) directing the carriers (Union Pacific and Denver and Rio Grande Western) to cease and desist from giving appellee certain terminal services "beyond the assembly yard, as described, without reasonable and compensatory charges in addition to the line-haul rates" (R. 283-284, 278).[2]

---

[1]It is unfortunate that appellants undertook to docket these two proceedings here as one appeal, with but one record. The minor duplications in printing thus avoided scarcely compensate for the intrinsic difficulties of segregating in a consolidated record the proceedings in each case.

[2]In the interests of clarity, we shall not in this Statement recite, or even summarize, the details of the operations at Midvale, the services performed at that plant by the carriers, the nature and history of the tariff charges there, and the like. They are set out in Point III of the Argument, *infra*, to which the Court is respectfully referred.

Appellee herein, and the carriers named in the order, filed a petition on June 13, 1947 to review this order in the United States District Court for the District of Utah (R. 256-270). A statutory three-judge court was convened, and on November 14, 1947, that court made findings of fact and conclusions of law, and on the basis thereof remanded the case to the Commission; meanwhile temporarily enjoining the Commission from enforcing its order (R. 302).

Although we deal with the matter in more detail in Point I of the Argument, *infra*, it is important here to point out both what this decision was, and what it directed the Commission to do on remand. As to the first, the court found that the Commission had based its order on the premise that the existing line-haul rates "do not cover transportation services rendered by the [transportation] Companies" within the plant, and held, specifically, that there was "no evidence" to justify such a finding, and indeed that the only evidence was to the contrary (R. 299-300). The court stated, however, that the Commission had, under *Ex parte 104*, as approved by this Court, authority, nonetheless, to direct the carriers to segregate the charges—for line-haul service and otherwise (R. 300). Accordingly, its conclusions of law, in remanding the case to the Commission, stated (R. 300):

> "* * * that the cases should be returned to the Commission for further proceedings upon the basis of evidence to be taken, or, otherwise, upon a new theory of its inherent power to require the transportation companies to fix separate and distinct tariffs covering so-called line-haul rates and plant service. * * * and that an order will accordingly be made remanding said cases to the Commission in accordance with the views herein expressed * * *."

The order accordingly stated that the cases "be remanded to the Interstate Commerce Commission for such action as it may find justifiable in the premises * * *" (R. 302).

No appeal was taken from this order by either the Commission or the United States (R. 453). On December 5, 1947, the Commission entered an order vacating its prior order of October 14, 1946, and reopening the proceeding "upon the present and existing record" (see R. 308). The Commission did not take any additional evidence. Instead, stating that "a further hearing would serve no purpose" (R. 318) it issued a new order repeating without modification the prohibitions to the carriers contained in the former one (R. 321-322).

In major part, this report and order of the Commission incorporated the previous order (R. 318). However, it specifically disclaimed *any* finding on the issue of whether the line-haul rate already compensated the carriers for all the transportation services, stating that its new order (R. 318):

> "* * * is not based in whole or in part upon any conclusions or findings in connection with tariff provisions or testimony as to whether the proposed rates are reasonable or do or do not include compensation for switching within the plant area."[3]

Again appellee and the two carriers sought review of the Commission's order by a complaint filed in the District

---

[3]Because of the specificity of its prior opinion in the American Smelting and Refining Company proceeding, the Commission felt required to make a specific repudiation, stating, in its new order in that proceeding (R. 454): "We hereby repudiate any reference or conclusion to the contrary conveyed by our discussion or evidence relative to such questions and the conclusions based thereon in our prior supplemental report herein."

Court in Utah, on October 6, 1948 (R. 303-314). Again a statutory three-judge District Court (the same three judges) was convened. This time, however, after making findings of fact and conclusions of law (R. 449-463) the court issued a permanent injunction (R. 464). It is from this second order that the present appeals have been taken.

The findings of the District Court are in considerable detail. Among other things, they repeat the earlier findings that there is no evidence before the Commission that the existing rates are not compensatory for the terminal services which appellee receives from the carriers (R. 455). In addition, the District Court concluded, as a matter of law, that "it is *res judicata* in these proceedings that the line-haul rates of the plaintiff carriers include compensation for all terminal switching services here involved" (R. 459). That fact being established both as a matter of the record and as a matter of law, the District Court concluded that the findings actually made by the Commission were legally irrelevant (R. 460). It noted, further, that the Commission's order, being one which thus required the carriers to charge twice for the same services, would violate Section 1(5)(a) of the Interstate Commerce Act, prohibiting unjust and unreasonable charges (R. 460). In addition, as discussed in Point III of the Argument, *infra*, the court specifically found that each of the findings upon which the Commission based its order was unsupported by evidence and contrary to the evidence before the Commission (R. 455-457).

The opinion of the District Court (R. 475) again explains the prior remand. The court stated that on the prior proceeding, it was argued that the effect of the Commission's order was only to require segregation of line-haul and

terminal charges. For that reason "the court, by remanding the case, gave the Commission the opportunity to make such an order under Section 6-1, which the Commission, for reasons best known to itself, thought not advisable to do" (R. 475).

This time, both the Commission and the United States appealed, and the appeals were allowed by the court below on March 7, 1949 (R. 465). On October 10, 1949, this Court noted probable jurisdiction (R. 1403).

QUESTIONS PRESENTED

We cannot fully agree with appellants' statement of the questions. A more accurate statement of them, so far as they apply to this appellee, is as follows:

1. Appellants failed to appeal from a judgment and mandate entered in this proceeding in 1947. Did not the Commission's procedure and order subsequent to the mandate violate its terms, and has not that mandate become the law of the case?

2. Is the Interstate Commerce Commission empowered by Section 6(7) of the Interstate Commerce Act to require additional compensation to be paid to a carrier for terminal transportation services notwithstanding the fact that the carrier has already been fully compensated for those terminal services by existing tariffs?

3. Did the court below correctly hold that several of the essential findings of the Commission were not supported by substantial evidence?

4. Does the Commission order fail to give required effect to a valid and important sampling-in-transit tariff?

SUMMARY OF ARGUMENT

There are four independent bases upon which we believe that this Court should affirm the decision below. They may be summarized as follows:

I

In 1947 the court below heard and decided this case against the appellants. They did not appeal. The mandate of the court at that time, however, did leave the Commission two possible courses of action. The Commission chose not to follow either. The attempt by appellants in this present appeal, two years later, to review the earlier mandate must be rejected since that mandate has become the law of the case. *Himely* v. *Rose*, 5 Cranch 313.

II

Appellants are forced here to contend that the Commission is empowered by Section 6(7) of the Interstate Commerce Act to require additional compensation to be paid to the carriers for terminal transportation services at appellee's smelter, notwithstanding the fact that the carriers have already been fully compensated for those terminal services by existing tariffs.

That the existing rates fully compensate for the terminal service is established on this record not only because it is res judicata as a result of the 1947 decision of the court below, but also because the Commission has stated that its order is valid whether or not the existing rates already compensate for the terminal services, and has explicitly repudiated the finding it had made in a prior decision that the carriers are not now compensated. On that basis we believe the court below was clearly correct in holding that

the Commission is not empowered under Section 6(7) of the Act or otherwise to enforce a requirement that the carriers be compensated twice for these terminal services. Every prior decision of this Court, and indeed the prior decisions of the Commission itself, make it clear that an order requiring additional compensation for terminal services can be justified only if the services are being rendered without adequate compensation. E.g., *United States* v. *Wabash R. R.*, 321 U. S. 403.

III

The Court below was also correct in concluding that there was no substantial evidence before the Commission to justify its conclusion that the "assembly yard" is the termination point of the line haul. The Commission has simply adopted a wholly mechanical, arbitrary, approach to a question which must depend upon the particular circumstances of the particular industry. Here, without reference to the distinctive character of this industry—that the line-haul tariffs are not only fully compensatory for, but have been made in contemplation of terminal transportation movements—the Commission has none the less applied the same rule which it would apply in a situation where the tariffs have not been so fixed.

Moreover, several of the essential subsidiary findings of the Commission, upon which its ultimate determination of the end point of the line haul is based, are unsupported by substantial evidence, as the court below found.

IV

Finally the Commission order summarily and without discussion jettisons a sampling-in-transit provision of the

carriers' tariffs which has been in effect for half a century, which has never been challenged as illegal or improper, which has been specifically approved by the Commission, and which is of extreme importance to the nonferrous mines of the West. An order so sweeping as incidentally to cancel this tariff provision as it applies to appellees, but not elsewhere, creates an illegal discrimination and is invalid unless the tariff provision itself is challenged, which it appears not to be. Moreover, if the order intends to challenge the sampling-in-transit tariff, it is equally invalid because it compels a violation of Section 6(7) of the Act, which requires a carrier to comply with its published tariffs. This proceeding is not only inappropriate to set the tariff aside, but the record is wholly deficient in the data on which any decision as important as that must rest.

ARGUMENT

We believe that the District Court was correct in permanently enjoining the Commission's order for four separate reasons. Each reason, we believe, independently warrants a judgment by this Court affirming the judgment below.

Because the four reasons are thus independent, we take them up in what might be deemed their order of simplicity. First we point out that the decision below is correct because the law of the case permitted no other conclusion. Second we show that, even if the law of the case be deemed not thus established, the unique "double compensation" theory of the Commission is wholly unsound. Third and fourth, and with more detail because of the necessity for dealing with the operating procedures at Midvale, we show that even if the first two arguments be ignored, nevertheless the

Commission's order was properly enjoined because there is no substantial evidence that the line haul ended at the "assembly yard", as found by the Commission, and because valid sampling-in-transit provisions of applicable tariffs are improperly nullified by the Commission's order.

I

THE DECISION BELOW SHOULD BE AFFIRMED BECAUSE THE LAW OF THE CASE PERMITTED NO OTHER RESULT

The principle upon which we rely can scarcely be in dispute. When a cause is remanded to, *e.g.*, the Commission, by a mandate of this Court, then the Commission is of course required to act in accordance with that remand in subsequent proceedings. On a later appeal, this Court would feel bound, as between the Commission and appellee, to consider in the second appeal only errors alleged to have occurred subsequent to the original remand. The mandate itself, and all that was decided by the first case, could not be questioned on the second appeal. This has been the rule of this Court throughout its history. *Himely* v. *Rose*, 5 Cranch 312; *Roberts* v. *Cooper*, 20 How. 467; *Clark* v. *Keith*, 106 U. S. 464; *see, Northern Pacific R. R.* v. *Ellis*, 144 U. S. 458, 464; *Great Western Telegraph Co.* v. *Burnham*, 162 U. S. 339, 343-344.

We believe there is no doubt but that the Commission failed to follow the first mandate of the District Court. Nor do we believe that it can avoid the consequences of that failure by reason of the fact that the mandate in question is that of the District Court, rather than of this Court itself.

A. THE COMMISSION FAILED TO FOLLOW THE DISTRICT COURT MANDATE AND ORDER OF NOVEMBER 24, 1947

The District Court in the first proceeding squarely held that the finding of the Commission that the line-haul rate was not compensatory for the terminal services, was unsupported by the record, and that absent such a finding, the Commission's finding of violation of Section 6(7) of the Act could not stand. The court also, however, stated that the Commission could, under proper circumstances, order the carriers to segregate this compensatory rate into the line-haul and terminal segments (under Section 6(1)), but had not done so. Under those circumstances, the court, citing the *Chenery* case,[4] concluded that it was proper to give the Commission a second opportunity to enter a proper order (Phillips, J., *dubitante*). Accordingly, it stated (R. 300):

> "* * * that the cases should be returned to the Commission for further proceedings upon the basis of evidence to be taken, or, otherwise, upon a new theory of its inherent power to require the transportation companies to fix separate and distinct tariffs covering so-called line-haul rates and plant service * * * and that an order will accordingly be made remanding said cases to the Commission in accordance with the views herein expressed * * *".

The Order, which was simply the final paragraph of the same document, accordingly remanded the cases to the Commission "for such action as it may find justifiable in the premises" (R. 302). The Commission took no appeal.

---

[4]Securities and Exchange Commission v. Chenery Corp., 318 U. S. 80. The Brief for the United States mistakenly cites (pp. 9-10) the second Chenery case, 332 U. S. 194.

Perhaps it could be argued that under that mandate the Commission might properly have reopened the case and attempted, by the introduction of further evidence, to create substantial support for its findings which the court had held to be unsupported—that the existing rates were not compensatory. That would be an extreme example of "two bites at the cherry" in administrative proceedings, but it might have been justified under the mandate by the specific reference of the court to "evidence to be taken". Whether that construction of the mandate be correct, however, is now irrelevant, since in fact the Commission made no attempt to follow that course. It took no further testimony whatever.

It is clear, however, that the Commission, consistently with the court's order, could have issued an order under Section 6(1) of the Act, requiring a segregation of the line-haul, and terminal charges.[5] Probably this was the *only* proper action it could have taken. That, at any rate, is the construction which the District Court put upon its own mandate. In the second proceeding, the court stated (R. 475):

> "The Court desires to assert that it was argued when the case was here before that the effect of the order was to require the railroad merely to segregate their tariff charges and make a specific tariff charge for the haul to the end of the line haul and

[5]Appellee would have urged before the Commission that a valid Section 6(1) order would have required a further hearing and further evidence addressed to the segregation of charges issue. Judge Phillips, in his concurrence, so implies (R. 300-302). Since the Commission chose to ignore the opportunity accorded it by the court, the question of its proper procedure thereon is no longer important.

> a separate specific charge for switching services beyond the end of the line haul *and that the court, by remanding the case, gave the Commission the opportunity to make such an order under Section 6-1, which the Commission for reasons best known to itself thought not advisable to do.*" (italics supplied)

This construction of the mandate by the same court (and indeed by the same judges) which had issued it, would seem to be substantially conclusive. There can be no real doubt that the Commission, when it had *no* further hearing, took *no* further evidence, and made no order requiring segregation of charges under Section 6(1), has "for reasons best known to itself" (R. 475) flouted the mandate.

B. THE COMMISSION MAY NOT NOW CHALLENGE, OR APPEAL FROM, THE FIRST MANDATE

What, then, is the consequence of this decision by the Commission to ignore the District Court's instructions? We think the answer is clear. Were it the mandate of this Court—*i.e.*, had the Commission appealed and the first District Court decision been affirmed *in haec verba*—there can be no doubt that the Commission could not now challenge that mandate, and would be required to accept the consequences of its failure to follow it. We think the same answer follows from the fact that it chose *not* to appeal the order. That mandate and judgment have become the law of the case. The District Court which heard the first case was acting under specific statutory authority. If its decision, when not appealed, is not given the same effect which would be granted to a decision of this Court if the appeal had been taken, then the authority of the District

Court is undercut and the statutory scheme of review is rendered ineffective.

Although the precise issue has not, so far as we are aware, been squarely presented to this Court, it has strongly intimated that it would apply the law of the case as determined by a District Court in just this situation. In *Inland Steel Co.* v. *United States*, 306 U. S. 153, 161, this Court stated:

> "* * * since the [statutory three-judge District] court had exercised jurisdiction to review and suspend the [Interstate Commerce] Commission's report and order, the administrative body was without power to act inconsistently with the court's jurisdiction, had it attempted to do so."

See also *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156, 160. See also, to the same effect in a state court hierarchy, *United Dredging Co.* v. *Industrial Accident Commission*, 208 Cal. 705, 284 Pac. 922 (1930). Moreover, an examination of other cases, particularly with respect to the bases upon which the rule of the law of the case has been rejected, leaves little doubt that here it should be applied.

There are a series of instances in which this Court has refused to apply the doctrine of the law of the case when the original mandate is that of an inferior court. All of these instances have differed in two determinative aspects from the present case. First, these instances all involved situations in which the original mandate could not have been appealed as a matter of right to this Court. Here, the order was appealable. Act of October 22, 1912, c. 32, 38 Stat. 220; see *Louisville & Nashville R. R.* v. *United States*, 242 U. S. 60. The judicial code as amended in 1948 also

permits appeal of such orders. 28 U. S. C. § 1253. In addition, these instances, unlike the present case, all involved situations in which there had been conformance to the mandate below and in which the only question was whether this Court should be completely bound by the instructions of the inferior court.

A typical example of these instances is *United States* v. *Denver & Rio Grande R. R.*, 191 U. S. 84. A lower state court had been required by mandate from the state supreme court to accept the sufficiency of defendant's plea. The lower court, conforming to the mandate, directed a verdict for the defendant. In reversing the decision, this Court noted (191 U. S. at 93) that the judgment embodying the original mandate not being final, "could not be made the subject of a writ of error from this court". Again, in *Southern Ry.* v. *Clift*, 260 U. S. 316, the state court judgment including the original mandate was not final and could not have been reviewed by the Supreme Court.

It is clearly proper for this Court to refuse to apply the law of the case as determined by a lower court when the party seeking to escape the effect of the original mandate could not bring the original decision before this Court, at least when there is no need for the exercise of the discipline needed to penalize a departure from instructions on the part of the court or agency directed by the original mandate.[6]

---

[6]Binding as the law of the case is upon an appellate tribunal, it has always been thought even more binding upon the court or agency instructed by the mandate. The latter can have no discretion and no right to reconsider what is determined by the mandate. *In re* Sanford Fork & Tool Co., 160 U. S. 247; Sibbald v. United States, 12 Pet. 488; Thornton v. Carter, 109 F. 2d 316 (8th Cir. 1940). See Sprague v. Ticonic National

If it were otherwise, important federal questions decided in non-final proceedings would escape any effective review by this Court. For similar reasons, this Court will not consider itself bound by the law of the case found by a lower federal court when the Supreme Court's discretionary review by certiorari is granted only after the second appeal, at least when there has been conformance below to the mandate. *Panama R. R.* v. *Napier Shipping Co.*, 166 U. S. 280; *Messenger* v. *Anderson*, 225 U. S. 436. See *White* v. *Higgins*, 116 F. 2d 312 (1st Cir. 1940).

In the present case, both these determinative factors[7] are absent. The wise tolerance of this Court toward the exercise of the discretion of administrative agencies in performing their fact finding functions and the extent to which they may be permitted to depart from merely formal rules of evidence and procedure only emphasize the necessity of

---

Bank, 307 U. S. 161, 168; Mantle Lamp Co. of America v. Knapp-Monarch Co., 81 F. 2d 428, 430 (7th Cir. 1936). Thus the reviewing court faces a different problem when the mandate has been followed than when it has been disobeyed. In the latter case it would seem that the discipline requisite to any orderly appellate procedure requires the mandate to be given effect by the court of final review.

[7]Other factors that, in conjunction with the two major ones, have been persuasive in inducing this Court in particular situations not to follow the law of the case as determined below are also absent from the present case. Thus *Messenger* v. *Anderson*, in the text *supra*, involved a situation in which the remanding federal tribunal decided on the first appeal a matter of state law which was definitively announced to be otherwise by a final decision between the same two parties made by the highest state court while the federal appeal was pending. Again, in *Southern Ry.* v. *Clift*, in the text *supra*, the remanding court was a state tribunal passing upon a federal question. Clearly such cases involve questions which are not present when a matter of federal law is being determined by the very court assigned by Congress to hear the case.

requiring such agencies to conform to the basic rules of procedure, among which obedience to the directions of a court reviewing under explicit statutory authority ranks high.

The brief for the Commission seeks to avoid this result by suggesting (pp. 127-128) that the present appeal is "in effect" "an appeal from both the first and last decisions of the lower court". It should be sufficient to point out that the appeal from the *first* decision, which should have been taken within 30 days (see Act of October 22, 1912, *supra*, p. 16), is about two years late.

We submit, therefore, that the present appeal may be decided, and the decision below affirmed, without more. We can see no escape from the conclusion that the Commission ignored—violated—the original mandate. If it believed itself aggrieved by that mandate, its proper course was not to flout it, but to appeal it to this Court. Not having done so, it cannot now be heard to complain.

II

THE COURT BELOW WAS CORRECT IN REJECTING THE COMMISSION'S THEORY WHICH WOULD REQUIRE DOUBLE PAYMENT FOR THE SAME SERVICE

In addition to the fact that the Commission has ignored the mandate of the court below, there is a further basic difficulty with appellants' position. This point, too, can be adequately discussed without the detailed facts, since it goes to the foundation of the entire case.

Reduced to its essence, the theory of the Commission in this proceeding may be stated as follows: if the carriers performed services beyond the point found by the Commission to be the proper one for the termination of the line

haul, then they violate Section 6(7) *even though these terminal transportation services, and what the Commission finds to be "line-haul" transportation services, are fully compensated for by tariff charges.* Stated in another way, the Commission asserts that a violation of Section 6(7) can be avoided only by requiring a *double* charge by the carrier, and a *double* payment by the shipper, for the same services. It scarcely needs to be pointed out that this would be a plain violation of Section 1(5)(a) of the Act, which prohibits excessive or unreasonable charges.

Appellants are understandably reluctant to reveal this as their theory quite so baldly as we have stated it above. The Argument in the brief for the United States begins (pp. 15-16) by italicizing the sentence in Section 6(7) which prohibits rebates—which would suggest that the terminal transportation services were rendered *without* full compensation to the carriers. Two pages later (p. 17) the Argument refers to the principle of *Ex parte 104* as prohibiting the "illegal rebates involved in the gratuitous furnishing of services". Finally, however, the brief (pp. 19-20) accepts the fact that the Commission had made no finding that any gratuitous service—and hence no rebate—was involved, but then urges that the Commission is simply advising "segregation" of rates. That, of course, is precisely what the Commission, "for reasons best known to itself" (R. 475) *refused* to do.

The brief for the Commission is even more contradictory. It repeats, at one point, the explicit concession in the Commission's report that it had made *no* finding on the issue of the compensability of the present tariff rates (p. 53). Then, however, in disregard of what the Commission itself has done, the brief speaks of "service without any charge" (p. 85) and of "free" service (p. 91).

We suggest that the safest course is to rely on what the Commission itself did. It *expressly* made no finding on the issue whether the existing line-haul rates fully compensated the carriers for both the line-haul and terminal transportation services (R. 318). And its order requires that the carriers cease furnishing services beyond the point at which it has deemed that the line haul ends "without reasonable compensation in addition to the line-haul rates" (R. 321-322).

A. THERE CAN BE NO DENIAL, ON THIS RECORD, THAT THE LINE-HAUL RATES ARE FULLY COMPENSATORY

In its first order in this proceeding, the Commission made a finding that the line-haul rates were not compensatory, and that, in consequence, appellee was receiving discriminatorily favorable treatment which was, in effect, a rebate (R. 271). That finding was challenged in the first proceeding in the District Court, as being wholly unsupported by the evidence, and, in its first decision, that court found that it was unsupported, and that in fact the only evidence in the record was precisely to the contrary (R. 299-300).

That finding was not appealed. More than that, when the case was again before the Commission, it made no effort to adduce evidence which *would* support its finding. Instead, as pointed out in detail in the Statement (pp. 5-6), it attempted simply to avoid the issue by *withdrawing* its prior finding that the rates were *not* compensatory for all services, and making *no finding at all* on the issue.

When the case again came before the District Court, however, it correctly refused to accept that solution. It made a finding of its own on the record—that the only

evidence was that the rates were compensatory (R. 455-456). In addition, as its first conclusion of law, it stated that it was now res judicata, so far as this proceeding was concerned, that the existing rates were compensatory (R. 459).

Not only do we think that the court below was correct on both counts,[8] but, if more be needed, this Court will recognize that the Commission has in effect conceded that to be true. The only possible meaning of its strenuous attempt to eliminate any trace of its prior finding on that issue (R. 318, 454) is that it believes that the case can properly be decided in its favor *either way*.

That, we challenge. When the line-haul rates are fully compensatory for both the line-haul and terminal transportation services, as we must assume that they are in this case,[9] the Commission *cannot* find that there is violation

---

[8]There is abundant and uncontroverted evidence in the record that the services here in question are actually compensated for by the existing tariff (R. 629, 646, 648, 650, 663-669). There is no evidence to the contrary.

Moreover it is clear that when in 1947 the District Court, which had explicit statutory jurisdiction, made a decision on this precise issue, in an appealable, but unappealed decision, the holding was res judicata in the later case. Grubb v. Public Utilities Commission of Ohio, 281 U. S. 470; Sewerage Commission of Milwaukee v. Activated Sludge, Inc., 81 F. 2d. 22 (7th Cir. 1936); reversed per stipulation, 102 F. 2d. 972 (7th Cir. 1938); Fowler v. Hunter, 164 F. 2d 668 (10th Cir. 1947), cert. denied 333 U. S. 868.

[9]The Commission's present brief recognizes (p. 53) that it is bound by its own explicit concession: "* * * the Commission has not here decided that tariff charges for plant spotting are or are not sufficient or reasonable." The occasional instances in which that brief overlooks this fact (*e. g.*, pp. 85, 91—particularly in arguing that the present tariffs are not compensatory (*e. g.*, pp. 93-102)—may be disregarded.

of Section 6(7) when carriers are fully compensated for the performance of the transportation services specified in their tariffs.

B. SECTION 6(7) DOES NOT REQUIRE PAYMENT TWICE FOR THE SAME SERVICES

This Court has enunciated the basic rationale of *Ex parte 104* a sufficient number of times that it is surprising to find the Commission now attempting to disregard it. As applied to the performance of terminal transportation services by carriers that basic rationale is that such performance violates Section 6(7) *if and only if such services are rendered without adequate compensation.* There is no possible logical basis for claiming that, when such services are fully paid for, the carriers' performance of them violates the Act.

A complete statement of this inherent basis of an *Ex parte 104* proceeding was given by this Court in the case of *United States* v. *Wabash R.R.*, 321 U. S. 403. The Court there related the history of *Ex parte 104* proceedings and noted that (p. 406):

> "* * * the Commission found that the freight rates had not been so fixed as to compensate the carriers for such [spotting] service and that the railroads by assuming to perform it * * * had assumed a burden not included in the transportation service compensated by the filed tariffs. And it concluded that the performance by the railroads of such service, free, * * * is in violation of § 6(7) of the Act."

The spotting services now in question *are* "compensated by the filed tariffs". And they are *not* performed "free". See also the similar statement in *Interstate Commerce Commission* v. *Hoboken Mfgrs. R.R.*, 320 U. S. 368, 378.

The most charitable explanation which can be made for the Commission's position is that it has confused an evidentiary matter with the ultimate fact in issue. The ultimate fact is whether the carrier is according a shipper a rebate by performing a service free. In some instances, that issue will be determined by this one evidentiary fact. For example, where the line-haul tariff provides generally for "delivery", then a determination of where the line haul ends will ordinarily also determine whether services performed by the carriers subsequent to that termination point and without extra charge are free. Even there, the determination of where the line haul ends is important, not for its own sake, but because of its relation to the basic question of whether or not the spotting services are paid for. If the rates paid under the tariff do in fact compensate for all the services which are rendered by the carriers, then the finding as to where the line haul ends loses all relevance in a Section 6(7) proceeding. The Commission's half mystic, half hysterical adherence to the "assembly yard" formula has no logical connection with any issue of *this* Ex parte 104 proceeding.[10]

The lengths to which the Commission is driven in attempting to explain its position here is exemplified by the opening paragraph of the Argument in its brief (pp. 41-42). It states:

> "The chief purpose of this application [cf. *Ex parte 104*] is to require the carriers serving these plants

[10]Even where the rates are fully compensatory, the Commission might have determined in a proper proceeding where the line haul ended in order to require, under Section 6(1), that the tariffs segregate the respective rates. This, however, the Commission refused to do even when invited to do so by the District Court in the first proceedings (R. 475).

> to render to them no more in delivery and receipt of freight than is rendered to other industrial plants throughout the country."

Let us hope not. If so, the Commission's present order is not drastic enough because the Commission is saying now in its brief that the carriers must be *forbidden* to render such services even if fully compensated by separate terminal charges. Then the brief continues:

> "Equality in service as between shippers, and removal of preferential service accorded a particular shipper as compared to services rendered shippers generally, is a main objective of the Interstate Commerce Act, and was one of the important results expected from the proceedings in *Ex parte 104*."

We can agree. But in what way it is "preferential" to give shippers in this industry one set of services which they fully pay for under the present tariff, and to give other shippers different services under different (and also presumably compensatory) tariffs? And in what way would this "preferential" treatment be eliminated if an extra charge is imposed for services for which the carriers are already fully paid? We do not take issue with the objective that preferential treatment be eliminated. We *do* take issue with the conceptualism which leads the Commission to the position that the label "line haul" has some magic significance of its own.

Perhaps it is not unfair to suggest that even the Commission, until its last orders in these cases, seems not to have been in doubt as to what it was seeking to achieve. The very title of its investigation in *Ex parte 104* is "Practices of Carriers *Affecting Operating Revenues or Expenses*". In the original *Ex parte 104* decision, in 1935, the

Commission fully agreed with the later decisions of this Court on the proper rationale to justify a finding of a violation of Section 6(7). There was no indication in that report that the finding of where the line haul ended was to be made determinative of the ultimate issue in those cases in which applicable tariffs covered services beyond the end of the line haul. Indeed, the Commission made it perfectly clear that the whole reason for *Ex parte 104* proceedings was the necessity of conforming terminal transportation services to compensation for them. It stated (209 I. C. C., at 29):

> "If a carrier operates over private industrial tracks, it is because in its discretion it elects to do so, and its legal obligation in such operations extends no farther than is covered by the compensation it exacts for the services performed. In other words, the obligation upon the carrier in such circumstances is to be measured by the compensation received and not by any definite duty otherwise placed upon the carrier by the statutes."

And in its conclusion to the original report, the Commission emphasized that the heart of its determination was whether or not the services were actually compensated for (209 I. C. C., at 45):

> "Generally the payment of allowances for service, or the performance of such service *without charge* to points within a plant which respondents are prevented, by the desires of an industry or the disabilities of its plant, from reaching, without interruption or interference by the conditions mentioned in the preceding paragraph, provides the means by which the industry enjoys a preferential service not accorded to shippers generally" (italics ours).

In sum, every element in the original report was geared to the determination of the very fact which the Commission now claims to be irrelevant.[11]

Moreover, this Court has premised its affirmance of *Ex parte 104* and similar Commission orders on its approval, in each such case, of a Commission finding that the line-haul rates were *not* sufficient to compensate for the questioned terminal services.

In the first such case, *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, this Court noted (pp. 406-407) that the Commission found "no service beyond those points of interchange for which the carrier is compensated under its interstate line-haul rates".

Likewise, in *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156, this Court pointed out (p. 157) that the Commission had found that "moving and spotting of cars in the industries' plants formed no part of the service covered by the line-haul rates".

In *Baltimore & Ohio R. R.* v. *United States*, 305 U. S. 507, which affirmed a Commission finding that the carrier performance of certain warehousing service violated Section 6(7), this Court pivoted its holding on the Commission finding that the warehouse services were performed "at rates and charges which failed to compensate the carriers for the cost" (see 305 U. S. 507, at 518).

Interstate Commerce Commission v. *Hoboken Mfgrs. R. R.*, 320 U. S. 368, involved the question of whether a terminal switching rail carrier was entitled to an increase in the divisions which it received out of joint freight rates

---

[11] The Commission's citations in its own brief in this Court likewise emphasize that adequate compensation is the heart of *Ex parte 104*. See pp. 105, 106, 117-118.

maintained by it and various trunk carriers. Upholding the Commission's negative conclusion, this Court relied on the Commission finding that "Hoboken is adequately compensated for its part in that service without including the payment to Seatrain in its divisions" (see 320 U. S. 368, at 375).

Again in *United States* v. *Wabash R. R.*, 321 U. S. 403, the most recent case in which the Court has dealt at any length with an *Ex parte 104* proceeding, the Court based its holding on the Commission finding that what was rendered by the carrier was "free spotting service" (see 321 U. S. 403, at 405).

Both appellants rely on the recent *per curiam* decision in *Corn Products Refining Co.* v. *United States*, 331 U. S. 790, in attempting to support the Commission's novel theory. They are not in agreement, however, on what the case holds. The brief for the United States (p. 21) states that in that case "the Commission made no finding as to whether the line-haul rates did or did not include compensation for switching and spotting services." The Commission, however, now states (pp. 123-124) that one of the "major" issues in the case was—

> "whether, in the face of uncontradicted evidence that line-haul rates do include compensation for the [spotting] service, without contrary testimony, the *Commission could lawfully find to the contrary.*"

There can be no doubt that the Commission is correct in asserting that it made a finding in the *Corn Products* case that the rates were *not* compensatory for the terminal services. In one of its reports in the case the Commission found "that the interstate line-haul rates of respondents

cover the delivery and receipt of carload shipments" at the "plant yard described in the report" and that it was therefore illegal for the carrier to perform services beyond that point "without charge in addition to the line-haul rates" (266 I. C. C. 181, 182). This, if words mean what they usually do, is a holding that the line-haul rates were not sufficient to compensate for the extra services.[12]

Again, we should point out that it was not even argued before this Court in the *Corn Products* case that it involved the additional issue which the United States now purports to find in it. Appellant industry in that case told this Court in its Brief in opposition to Motion to Affirm that (p. 3) the case was one in which the Commission had found that "railroads were not compensated by their line-haul rates for spotting cars." And in its Statement as to Jurisdiction, appellant said (p. 8):

> "Thus there was affirmative * * * evidence by a competent traffic officer that the line-haul rates of the railroads included compensation to them for the switching of cars to and from points of loading and

---

[12]That the Commission itself regards such a statement as a holding to this effect is indicated by the predecessor proceedings before the Commission in the present case. In the United States Smelting report, 263 I. C. C. 749 (1945) (R. 330), the Commission held in virtually the same words as in the *Corn Products Refining* report that the "interstate line-haul rates * * * cover the delivery and receipt of carload shipments" at the "assembly yard" and that the violation of Section 6(7) consisted of "the performance of service beyond the yards as described at the line-haul rates" (263 I. C. C. 749 at 758-759) (R. 341). This statement was described in the subsequent report of the Commission (266 I. C. C. 476) (R. 271) as a finding "in substance, that respondents' line-haul rates do not include compensation for such services beyond certain tracks described of record" (266 I. C. C. at 476) (R. 271).

> unloading in appellant's plant. The Commission reached a contrary conclusion and based its order thereon."

Nor did the appellees in that case argue that it involved the radical holding which the Commission now tells this Court was latent in it. In the "Motion of the United States to Affirm" in that case it was stated (p. 2) that the "issues are the same as have been presented in several of the so-called terminal services cases in which the Commission's orders have been uniformly sustained by this Court".

Finally, if more be needed, we point out that the *per curiam* opinion of this Court cites the *American Sheet & Tin Plate* case, *supra*, and the *Wabash R. R.* case, *supra*, in both of which, as we have already shown, the Court relied on the Commission's finding of "free" services. Nothing either apparent or "lurking in the record" of the *Corn Products* case requires this Court to adopt a rule which would impose an added charge for services already paid for once.

We should perhaps advert to a final suggestion of the United States (p. 19) that a requirement that the Commission find whether the line-haul rates are compensatory would convert these supplemental hearings into rate hearings. No similar fear is voiced in the brief for the Commission, possibly because it recognizes that it has been able, without undue burden, to make that finding in supplemental proceedings up until the present one, and indeed made it specifically and as a matter of course in this one in its first report (R. 40, 271) (pp. 27-29, *supra*). Moreover, we have already indicated (p. 24, *supra*) that in every case in which the line-haul tariff by its terms covers only "delivery", the determination of when the line haul ends will in fact settle whether there are additional services performed by the

carrier which must be paid for at a rate in addition to the line-haul tariff.

We respectfully submit that the Commission's new theory should be rejected, as it was by the court below, and that on this ground, too, the decision below should be affirmed.

III

The Commission's Finding That the Line Haul Ended at the "Assembly Yard" Is Wholly Unsupported by the Record

For reasons already stated in Points I and II, we believe that the Court need not concern itself with the details of appellee's operations at Midvale. Nonetheless, we do not rest there. The judgment of the District Court enjoining the Commission's order is also fully supported on two other bases: first, that the court was correct in finding that there was no evidence to support the Commission's finding that the line haul ended at the "assembly yard", and, second, that such a finding sets at naught, and without valid reason, a sampling-in-transit provision of the tariffs which has been long in effect.

These two additional bases for affirmance constitute Points III and IV of this brief. However, in order to make them intelligible, it is necessary to review, to some extent, the findings as to the operations of the Midvale smelter, and as to the carriers' activities and facilities there. We will be as concise as the facts permit, and refer to details in connection with the several arguments.

A. THE NATURE OF THE CARRIERS' SERVICE AT APPELLEE'S MIDVALE SMELTER

The plant layout. Appellee's smelter, as the Commission found, is served by two carriers, the Union Pacific

and the Rio Grande. They haul ore, coal, coke, limestone, smelter products and miscellaneous supplies to and from the smelter at Midvale, Utah (R. 272). An undisputed Commission finding is that about 10 percent of the inbound, and 66 percent of the outbound movement is interstate (R. 272, 615).

The smelter yard area, as the Commission found, contains 14 miles of standard-gauge trackage, comprising 48 separate tracks serving about 16 locations for the loading and unloading of cars (R. 331). The switching and spotting of cars within the plant is performed by two Rio Grande switch engines operated by four Union Pacific crews (R. 334). The switching operations under discussion here are distinct from the intra-plant transportation of commodities handled by appellee's own employees on electrified narrow-gauge tracks; the Commission concedes that there is no interference with the carriers from such operations (R. 331).

The "assembly yard".—As the Commission found, cars are usually brought into the "south" or "assembly" yard when they arrive at the plant (R. 272, 595). The uncontested evidence shows that these incoming cars are placed here—or on other possible tracks—at the carriers' own convenience (R. 595, 597-599). In like manner, outgoing empty and loaded cars before departure from the plant are sometimes held in this yard for the convenience of the carriers (R. 609-610).

This "convenience of the carrier" requires a bit more explanation. Neither carrier has adequate—or anything like adequate—terminal facilities at Midvale. The Rio Grande, for example, has one receiving track of its own at Midvale which holds only 13 cars. Consequently, as the

Commission admitted (R. 333), the appellee's tracks, inside appellee's plant are "used by both [carriers] as assembly and classification tracks for general switching and passing and storage tracks."

General spotting procedure.—Of the total inbound traffic, about 80 per cent is spotted directly to the point of unloading (R. 623). All spotting is done, of course, on instructions of appellee, but the orders are general, and may be given even before the car reaches the plant (R. 623). Evidence further indicates that the particular switching movements in carrying out the orders are within the sole control of the carriers and for their convenience; the appellee may not even know where a car is, even though it is in the plant, when orders for it are given (R. 587-588, 594-595).

The sampling-in-transit procedure we detail below. Apart from that, as the Commission found, there are, in the plant, tracks for the final reception of ore, tracks serving facilities for stockpiling coke and other commodities, and tracks serving facilities for loading lead bullion and matte (R. 332).

The Commission found that the outbound traffic, which consists of smelter products and ore which by reason of sampling-in-transit procedures is reshipped to other smelters, constitutes about 20 percent of the total carload movement (R. 335). The Commission made no finding of interference by appellee with this traffic, yet since it, too, is assembled by the carriers for their own convenience in the assembly yard, it too may be assessed additional charges by the Commission's order.

Sampling-in-transit.—A further characteristic of the movement of ore is occasioned by the fact that weighing

and sampling of ore is necessary to determine both the freight *rate* and the freight *destination*. The several nonferrous smelters in the region have varying facilities, with the result that greater recovery of metal values can be obtained at Midvale for some ores, at Garfield for others, and at other smelters for still other ores, as their assays may indicate. The shipper wants the highest possible recovery (R. 647). So, too, does the carrier, because the freight rate on these ores is a valuation rate (R. 646, 652). If, therefore, a carload of ore arrives at Midvale, and upon sampling is found to be such that it can be more efficiently treated at a different smelter, it is taken on to the other smelter on a through rate, as described more in detail below.

Consequently, there are in the plant track scales on which full and empty cars may be weighed. The weighing is necessary in order for the carriers to determine the rates to be charged, and the carriers have no scales of their own (R. 652, 591). It should be added that the evidence shows that the scales are also occasionally used for the carriers' convenience in weighing traffic not belonging to the appellee (R. 591-592, 652, 671-672). In addition, as the Commission found, there is in the plant a combination sampler and concentrator, and a thaw house where frozen ore may be thawed in the winter months to make accurate weighing and sampling possible (R. 333).

We should also point out here that in addition to the sampler (and the related facilities) at Midvale and the other smelters involved in the companion case, there is a sampler at Murray, Utah. It is not in dispute that this sampler performs the same service, for the same reasons, and under the same tariff provisions, as appellee's sampler at the Midvale plant (R. 587, 607, 646-647).

The tariff provisions.—The undisputed testimony of appellee's General Traffic Manager shows that almost a half century ago, when appellee's smelter was first built (R. 647-648)—

> "an agreement was made with the carriers in consideration of the smelting company providing yard trackage, scales, etc., to furnish at the smelter all terminal services necessary in handling of ores and concentrates, compensation for which was to be included in the line haul rates."

In November 1920, as the result of an order of the Director General of the United States Railroad Administration (see R. 649) the tariff was modified to include an extra charge for certain extra intra-plant movements. That provision of the tariffs of the two appellee carriers read (R. 649):

> "Delivery of a line haul carload shipment destined to smelters at Midvale, Utah, will include one movement of commodity within the smelter plant over track scales to and from smelter samples, or to and from combination sampler and concentrator, to a designated unloading point indicated by the smelting company. Also from track to track within smelter plant for each additional movement not provided for, $2.50 per car."

In July 1938, there was a further change in the tariffs, believed by the carriers to be required by the original *Ex parte 104* order. Under this new tariff, all movements in the plant under the line-haul rate were eliminated except the movement over the scales and subsequent delivery to any designated track within the plant which could be accomplished by an uninterrupted movement (R. 628-629, 650,

663-669). Appellee has not acquiesced in the validity of this change, believing that the 1920 provision was in all respects in conformity with *Ex parte 104* (R. 650).

The sampling-in-transit provisions of the tariffs, which are as old as the smelters themselves, allow the ore to be sampled at Midvale (or other smelters) or at the independent sampler at Murray, Utah, and then forwarded to destinations with no extra charge (see, *e. g.*, R. 309).

B. THE COURT BELOW PROPERLY FOUND THAT ON THE RECORD BEFORE THE COMMISSION ITS FINDING THAT THE LINE HAUL ENDED AT THE ASSEMBLY YARD CANNOT BE SUPPORTED

With this summary introduction to the general factual picture, on which there is no substantial dispute, we come to the issue whether the Commission's findings can be supported. The Commission's report concluded (R. 320):

> "(8) That common-carrier transportation which respondents [carriers] are obliged to perform begins and ends at the assembly yard and that all services beyond that point in the plant area are industrial or plant services for which respondent should make reasonably compensatory charges."

The District Court, in a series of findings (Findings 13-17, R. 455-457) held this finding to be not only unsupported, but directly contrary to the evidence. It found that there was no evidence that the "assembly yard" at Midvale constituted a reasonably convenient point of delivery or receipt; on the contrary, it found that the only evidence was that the carriers had for 50 years delivered and received freight at points of unloading or loading beyond the "assembly yard" and never had received or delivered it there. The

District Court found that there was no evidence that the "assembly yard" tracks were industrial tracks of appellee; on the contrary, the only evidence was that the "assembly yard" was the only available terminal facilities of the carriers, and was used by them as they would use their own terminal facilities anywhere else. The District Court found that there was no evidence that the carriers' transportation services began and ended at the "assembly yard"; on the contrary, the only evidence was that the line-haul rates of the carriers included compensation for additional movements incident to determining the value of inbound ores and concentrates.

We believe the District Court was correct, for two reasons. First, the subsidiary findings of the Commission, even taken at face value, do not support its basic finding that the line haul ends at the "assembly yard". Second, the court below was correct in stating that there was no evidence to support the subsidiary findings on which the Commission relies.

1. The basic difficulty with the Commission's ultimate finding, taking its subsidiary ones at face value, is that it ignores the difference between a tariff which does *not* include terminal movements, and one which does. A brief review of the nature of its *Ex parte 104* decision will make our position clear. We must keep in mind that the issue, in this branch of the argument, is where the "line haul" ends.

The Commission's basic report in 1935 indicated its awareness that similar subsidiary findings would not lead to the identical conclusion as to the ending place of the line haul in every case. Indeed, that report purported to deal only with the "general situations" presented (209 I. C. C. 11, at 15), and recognized that "in the nature of things, no

inflexible formula can furnish a solution" for the problem as to when delivery at the plant is made (209 I. C. C. 11, at 17). This Court has noted that the Commission determination of where carrier duty ends is not to be decided "by mechanical operation of a fixed rule of law". *Swift & Co.* v. *United States*, 316 U. S. 216, 225.[13]

The premise of the original *Ex parte 104* report was that the line-haul tariffs were not fixed in contemplation of the spotting services questioned by the Commission. The Commission finding is particularly clear, and particularly significant here (209 I. C. C. 11, at 44):

> "It is likewise urged that the line haul rates have been fixed to compensate the carriers for the performance of spotting service, but our consideration of the service as here involved leads us to a different conclusion. Many of the industries which now receive allowances, or the performance by the carriers of the spotting service in lieu thereof, performed their own service without compensation or assistance for many years prior to the time they began receiving it from the carriers, and at the time the change was made, the line haul rates were not altered. In such cases the carriers simply assumed a burden not previously borne."

---

[13]The necessity for avoiding "mechanical" rules is particularly evident when the case, like the present one, is a carrier-performance one rather than an allowance one. The Commission noted that the evidence before it was largely confined to the allowance type of case (209 I. C. C. 11, at 16). Most of the conclusions of the report were directed to allowance situations (209 I. C. C. 11, at 29-39), and the report quoted with approval a previous Commission statement to the effect that an allowance case must have different standards applied to its determination than a carrier-performance case (209 I. C. C. 11, at 30). See also the statement at 209 I. C. C. 37.

It is clear, in other words, that the Commission may not automatically apply the same standards as to the ending place of the line haul in those situations in which the original tariffs were not based in part upon services rendered beyond that point, and in cases where they were. Cf. *Interstate Commerce Commission* v. *Chicago, Burlington and Quincy R. R.*, 186 U. S. 320. That would be "mechanical operation" with a vengeance.

In the present case, unlike those upon which the original standards of the Commission were based, the tariffs have *always* been fixed to compensate the carriers for their performance of the terminal services to which the Commission now objects. As we have stated in more detail above—and we should emphasize again that these facts are not disputed—near the beginning of the 20th century at the Midvale Plant, "an agreement was made with the carriers in consideration of the smelting company providing yard trackage, scales, etc., to furnish at the smelter all terminal services necessary in handling of ores and concentrates, compensation for which to be included in the line haul rates" (R. 647-648). Various changes have since been made in the applicable tariffs, but it is wholly clear that every tariff has been made with explicit consideration of the services now in question, and the rates have been carefully designed to meet the problem which the Commission would solve by an arbitrary decision unrelated to, and in complete disregard and defiance of, this long history (R. 262, 663-672, 756, 757-761).

In this situation, we think the court below, which *did* give consideration to the facts as to the tariffs and what they meant (R. 456-457) was correct in concluding that the evidence could not support a finding that the line haul

ended elsewhere than at the actual and customary points of loading and unloading at the smelter. That is what line haul has meant *at Midvale* for half a century. This is what the line-haul tariff covers, and what the railroads receive compensation for in the line-haul rate. To pick out the "assembly yard" and assign it as the end of the service is no less arbitrary than stating that it ends as the car crosses the plant boundary. Nothing in *Ex parte 104*, nor in the cases in which this Court has approved supplemental findings of the Commission under it, lends support to the conclusion that the Commission can thus disregard the services which the line-haul rate was fixed to cover.

2. Moreover, as the court below correctly found, there is no evidence to support several of the essential subsidiary findings upon which the Commission rested its ultimate finding that the line haul ended at the "assembly yard".

a. One such subsidiary finding is that the "assembly yard" was a reasonably convenient point for interchange (R. 320). On the basis of the evidence before the Commission, that is simply not the fact, and no evidence suggests that it is. Rather, as the court below found, the "assembly yard" is "the only available railroad terminal facilities" of the carriers for the "ordinary railroad terminal handling" of the carload freight to and from appellee's smelter (R. 456).

The tracks designated by the Commission as the "assembly yard" have all the characteristics of railroad terminal facilities. The railroads would have great difficulty in handling traffic to and from the smelter except for these tracks (R. 589-591). As in other terminal facilities, the manner of switching was completely under the carriers'

control (R. 587-588, 601, 614). As in other terminal facilities, the cars are placed in the yard at the carriers' own convenience (R. 595-599). The tracks are maintained so as to secure efficient locomotive switching (R. 611). Again, let us emphasize, this evidence was undisputed; the statements to this effect by an industry representative were corroborated by carrier representatives (R. 625-626) and were not contested by the Commission.

Indeed, the inherent weakness of this subsidiary finding is demonstrated by the manner in which appellants now attack the holding of the Court below that that finding was unsupported by evidence. The total argument in appellants' two briefs in support of this finding of the Commission is the following sentence (Brief for the Commission, p. 67):

> "The record of the Midvale and Leadville plants contain little or no direct opinion that the designated yards there are railroad yards."

Apart from the inaccuracy of the statement (see R. 587-591), this is a rather extraordinary argument—that the alleged absence of substantial evidence *against* an administrative finding is equivalent to the presence of substantial evidence for it.

In view of the entire evidence as to the nature of the "assembly yard" tracks, there simply cannot be a basis for an ultimate finding that the line haul ends at that point. Not even the Commission, presumably, would deny that a railroad terminal yard must *precede* any reasonably convenient interchange point.

b. Another unsupported subsidiary finding which is essential to the Commission's decision that the line haul ends at the assembly yard is that relating to "interference" by

appellee. The Commission's original report has pointed out that spotting service is service beyond a convenient interchange point (209 I. C. C. 11, at 16, Note 3). But the line haul may nevertheless extend *past* such an interchange point unless such an extension involves the rendering of service solely for a shipper's convenience (209 I. C. C. 11, at 30) beyond the point of interruption or interference by the shipper (209 I. C. C. 11, at 44-45). Here, there is no substantial evidence to support any finding of such interruption or interference by appellee in the "assembly yard".

The contention by the Commission that such interference exists is singularly vague. Finding (6) of the Commission, the only finding bearing on this issue, states merely (R. 320) that

> "the services to and from the 'assembly yard' and between points within the plant area are not and cannot be performed in a continuous movement without interruption or interference at respondents' operating convenience because of the disabilities of the plant, including the manner in which industrial operations are conducted, all as explained in the prior supplemental reports herein."

"Prior supplemental reports" provide little amplification of this general statement of a conclusion that must be crucial to the Commission's attempt to uphold its switching order. The October 14, 1940 report of the Commission apparently contains the statement upon which the Commission most relies to uphold its finding (R. 277):

> "It is manifest that when, as here, cars are held in the assembly yard awaiting instructions from the plant with respect to further movement, respondents are prevented from performing an uninterrupted

service at their ordinary operating convenience in a continuous movement."

The Commission does not refer to any evidence supporting its general charge that cars are delayed in the "assembly yard" on orders of appellee. Such a conclusion could not be supported on the record. Sometimes, for example, orders for the spotting of cars are issued by appellee even before the arrival of cars at the plant (R. 623). Appellee does not or may not even know where a particular car is at any given time (R. 594-595). The evidence is conclusive that incoming cars are not, in fact, held or delayed in the "assembly yard" by orders of appellee. Orders for the spotting of cars are given promptly. Any delay that occurs in the yard results from the operating convenience of the carriers, or, on outgoing cars, is attributable to the nature of sampling-in-transit tariff provisions. The sweeping generalization of the Commission, upon which it has apparently based this crucial conclusion, is not supported by any evidence given by the industry, the carriers, or the Commission observers (R. 614, 621-623, 625-626).

In the Commission's most recent report it makes no mention of delays alleged to have occurred in the "assembly yard" other than those attributable to appellee's orders. But in the earlier reports, there is also indication of alleged switching delays found by Commission observers to occur. It may be helpful to this Court, therefore, if such delays are also examined in the light of the burden upon the Commission to show actual interference by the industry within the "assembly yard" in order to justify the order which was enjoined below. The Commission statement of these delays is found in its report of October 1, 1945 (R. 334). It is significant that the statement of these delays as found in this

report differs materially from the statement of the same delays given by the Commission representative at the hearing. The report, for example, in addition to listing alleged delays occurring subsequent to the "assembly yard" and therefore obviously irrelevant to the Commission order, states that on March 28 a delay occurred from 10:30 A. M. to 11:10 A. M. "waiting for engine to clear scale and blocked from south yard" (R. 334). The statement by the Commission representative at the hearing in regard to the same delay was more specific and more modest: "Engine 62 was delayed by engine 58 at the scale track. However, that particular delay may have been due to the fact that the brake rigging on the tender of engine 58 had become in some way disconnected or broken down" (R. 637). In the Commission report there is mention of a delay on March 29 from 10:50 A. M. to 11:05 A. M., "blocked from entering south yard" (R. 334). In the hearing the same delay was reported, "On March 29, engine 62 was delayed from 10:50 A. M. to 11:05 A. M. by engine 58 working on the scales" (R. 637). Apparently, therefore, these few observed delays actually occurred not as part of the switching operations, but as incidents of later unloading, spotting or weighing. In addition, it should be noted that none of these delays can be attributed, on the basis of the evidence before the Commission, to the appellee. The Commission representative who discussed these delays was asked: "Do you know whether or not these delays are a result of the industry, or whether they are just the result of normal switching in the plant between the two locomotives?" He replied, "Of course, I could not tell that. It was a delay. That is all I know." He was then asked, "That could happen in any switch yard?" The reply was that it could so happen and does so happen (R. 640-641).

Weighing and sampling delays might conceivably be relevant to a Commission order establishing the end of the line haul at some point *beyond* the assembly yard. See 209 I. C. C. 11, at 40. They are clearly not relevant to the present Commission order. It should also be noted that, in any event, these delays are not of the type significant in measuring the end of the line haul. Industrial weighing is discussed in the original *Ex parte 104* report at 209 I. C. C. 39-40. The Commission concluded that weighing for the account of the industry constituted an interference by the industry with carrier operations. This conclusion was based upon the fact that in the situations examined by the Commission, "in practically all cases the unwillingness of the industries to accept the weights of the carriers and the consequent use of the industries' scales involves extra switching within the plants * * *" (209 I. C. C. 11, at 39). On the contrary, in the present situation there is every indication that weights taken by the carriers would be accepted by the appellee although, of course, such weighing would involve great extra work for the carriers (R. 656). In a case relied upon by the Commission for the determination of its standard in the basic *Ex parte 104* report, the carriers "have their own track scales and are able and willing to perform for all other shippers" (209 I. C. C. 11, at 40). In the present situation, on the other hand, "if the weighing were not permitted within the plants, then it would be necessary for the carriers to either provide costly facilities for weighing or to transport the tonnages considerably greater distances to ascertain the weights" (R. 652).

The necessity of affirming the decision below in order to give needed affirmative support to the sampling-in-transit

provisions of applicable tariffs is discussed in the final section of this brief. Here it should only be noted that any delay incident to sampling is in the same category, or in one even more favorable from the industry standpoint, as delays incident to weighing. Sampling, like weighing, must be done for carrier as well as industry purposes. The ultimate destination of most ore shipped into Midvale cannot be determined until sampling is completed. Often, therefore, sampling, as between appellee and the carriers, is of benefit only to the latter. Moreover, sampling, even more than weighing, can be performed only by the industry. The carriers have no facilities which would enable them to perform the necessary sampling operations carried out at Midvale (R. 592, 646). Where services are useful both to carrier and to shipper, they cannot be classified as performed for shipper convenience unless the shipper elects to do them itself despite the availability of carrier performance. Cf. *Pie Bakeries, Inc.* v. *Railway Express Agency, Inc.*, 225 I. C. C. 171, 172 (1937).

IV

In any event, the decision below should be affirmed because the commission's order fails to give proper effect to valid sampling-in-transit provisions of applicable tariffs

We have already referred, in part A of Point III, to the sampling-in-transit provisions of the carriers' tariffs. We know of no challenge to their validity, nor do we know of any basis for such a challenge.[14] Yet the order of the Com-

[14]The present sampling-in-transit tariff has actually been approved by the Commission in a proceeding not since reversed or questioned. Nonferrous Metals, 204 I. C. C. 319, 387-389, 404-405 (1934).

mission which has been enjoined by the court below would effectively nullify these provisions. Most of the terminal movements to which the Commission objects take place under the provisions of the tariff. Moreover, to the extent that the services provided for in this tariff constitute either "transportation" or "any service in connection therewith" within the meaning of Section 6(7), the Commission may not require deviation from the filed tariffs without formal disapproval of them.

The sampling-in-transit tariff provisions, as we have already stated, have been in effect since the turn of the century (R. 646). These provisions, as described by the General Traffic Manager of appellee, "allow shipments of ores and concentrates to be sampled in transit at one or more of the public samplers at the Utah smelters or the independent sampler at Murray, Utah, and then reforwarded to the smelter that would be most advantageous" (See, *e. g.*, R. 309). Sampling, of course, involves weighing, thawing (if the ore is frozen) and usually unloading and loading (R. 604-605, 607). The ultimate destination of the ore is not known until the sampling is completed. The provision insures maximum recovery from the ore and is clearly for the benefit of everyone concerned—the shipper, the carrier and the smelter.

Although the Commission's order does not mention the sampling-in-transit provisions of the tariff as such, there is no doubt that its order would effectively abolish it. The order requires the carriers to make an extra charge to appellee for all movements subsequent to the "assembly yard". No sampling in transit is possible without such movements.

This tariff is of vital importance, not only to appellee, but to the whole nonferrous mining industry in Utah. Yet nothing in the Commission's order or report explains or supports its summary abolition. The report accompanying the most recent order does not even mention the sampling-in-transit provisions. The previous reports referred to these provisions briefly and non-committally, *e.g.* (R. 276):

> "It is not known at the time of sampling at Midvale whether the destination of the ore is to be the Midvale or some other smelter. Nor is the final unloading of it at Midvale known until after sampling. Under the transit arrangement, no switching charge is made if the ore is forwarded to other smelters after sampling at Midvale."[15]

The Commission reports give no further indication of awareness of the drastic nature of its order in this request. Perhaps even more surprisingly, the brief for the Commission in this Court is similarly silent.

One can only speculate, therefore, on what the Commission means to do. On the one hand, the Commission may intend to penalize only the appellees' smelters by wholly eliminating the application of the sampling-in-transit provisions to Midvale (and the smelters of appellee American Smelting and Refining Company) while permitting the sampler at Murray to retain the full benefits of the tariff. On the other hand, the Commission may intend to eliminate the sampling-in-transit provisions of applicable tariffs alto-

---

[15]The final sentence of Commission's statement refers to the 1938 change made, over appellee's objection, by the carriers in purported reliance upon the basic *Ex parte 104* report of the Commission. Appellee has never agreed to this change which, although less in extent, is objectionable for the same reasons which apply to the present Commission report.

gether, striking at appellees' smelters first. This Court should reject either alternative.

A. THE TARIFF CANNOT BE DISCRIMINATORILY CONSTRUED TO APPLY TO THE OPERATIONS OF OTHER SAMPLERS, BUT NOT THOSE OF APPELLEES

The sampling-in-transit operations are carried out by the same carriers at all the samplers. To allow the discrimination against appellees' smelters, which would be the necessary consequence of the Commission orders, would be to violate the Interstate Commerce Act in a vital respect. This Court has noted that the prevention of discrimination between localities by the same carriers was one of the major objects of Congress in passing the Interstate Commerce Act. *Central R. R. of New Jersey* v. *United States and Interstate Commerce Commission*, 257 U. S. 247, 260. The prevention of this kind of discrimination between shippers takes precedence even over the assertion of traditional property rights. *United States* v. *Baltimore & Ohio R. R.*, 333 U. S. 169. In carrying out this policy, the Commission has noted that in-transit provisions must be condemned when their allowance results in the "preference of one individual or locality over another". *Transit on Cottonseed at Quanah, Texas*, 232 I. C. C. 183 (1939). Entirely apart from all other questions—whether switching services are adequately compensated for, whether these services constitute transportation, and where the line haul ends—an order of the Commission cannot be sustained which creates, by its terms, a plain discrimination between appellees and the sampler at Murray, Utah.

We do not mean to say that the Commission could not, as the first step in a general attack on the sampling-in-transit provisions, move against appellees' smelters above;

the Commission when dealing with evils is not required "to suppress all simultaneously or none". *United States* v. *Wabash R. R.*, 321 U. S. 403, 414. We do say that there is no evidence that the Commission is attacking sampling in transit as such. Its order is not directed at it by name; rather, it almost casually abolishes it as a consequence of the sweeping nature of the order. Nothing indicates that the next step is the abolition of the tariff provision at the other samplers.

That, we believe, is discrimination, and condemned by the Interstate Commerce Act itself.

B. NOR MAY THE SAMPLING-IN-TRANSIT TARIFF BE NULLIFIED WITHOUT ANY CONSIDERATION OF THE USEFULNESS AND NECESSITY OF ITS PROVISIONS

If, however, the Commission chooses to say that it *is* dealing with an evil in the sampling-in-transit tariff, and that this is no more than the first step in the campaign, we think nevertheless the present order must fall. First, the Commission may not attack a tariff provision except in a proceeding in which it considers the nature of that provision, its usefulness to the carriers and the shippers, and the social function which it serves. Second, the result of any such proceeding, had the Commission held it, would have been to indicate that the present sampling-in-transit tariffs are valid and useful, and should be continued.

1. There can be no doubt that under the Interstate Commerce Act pubished tariffs for transportation or services in connection therewith must be complied with. Section 6(7); *Louden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 520. Indeed, as apposite to the present situation, this Court has explicitly held that when a carrier

makes an extra charge for a spotting service which is actually covered by the line-haul tariff, it violates Section 6(7) of the Act. *Chesapeake & Ohio R.R.* v. *Westinghouse Co.*, 270 U. S. 260.

The tariff, of course, must be for "transportation * * * or for any services in connection therewith" to fall within the mandate of Section 6(7). *Baltimore & Ohio R.R.* v. *United States*, 305 U. S. 507, 526. The "tariff" in the *Baltimore & Ohio* case applied to warehousing which may be taken as an indication of the type of "tariffs" which are not made mandatory by Section 6(7).[16] By the same token, the spotting services involved in the *Chesapeake & Ohio* case, *supra*, indicate the type of tariff to which Section 6(7) applies. Here, the car movement involved in sampling in transit appears to be clearly within the scope of the Section; the weighing is necessary to determine the values and rates, the sampling is necessary to determine both the rates and the destination, and the carriers have facilities for neither operation.

Nor may the Commission successfully assert that it, at least, is not bound, and may set aside in an *Ex parte 104* supplementary proceeding a sampling-in-transit tariff, whether or not it falls within the mandate of Section 6(7). Both this court and the Commission have been careful to note that in-transit privileges often serve important functions and are not to be generally or casually condemned.

---

[16]The cases cited in appellants' briefs in which the Court has refused to allow published tariffs to justify improper *allowances* in *Ex parte 104* proceedings suggest that a "tariff" providing for an allowance—payment *by* the carrier instead of *to* it—may also escape the mandatory effect of Section 6(7). Brief for the United States, p. 22; Brief for the Commission, pp. 102, 107-112, 114-117.

See *Baltimore & Ohio RR.* v. *United States*, 305 U. S. 507, 524. Particular in-transit privileges have often been specifically approved by the Commission, even when they involved considerable processing to the shipped goods and even though they did not, as in the present case, determine the destination point of the shipment or serve any other function vital from the carrier's point of view.[17] *E.g.*, *Coffee Roasted in the Southeast*, 225 I. C. C. 271, 275 (1937); *Otis Gin & Warehouse Co.* v. *Atchison, Topeka & Santa Fe Ry.*, 219 I. C. C. 749 (1937). Of course transit privileges can be abused. See *Grand Rapids & I. Ry.* v. *United States*, 212 Fed. 577 (6th Cir. 1914). But when such a privilege is questioned, the decision as to its allowance or continuance is a complex one, involving the study of the carrier, shipper and public interests which are bound to be affected by any sweeping change. The Commission has made such studies and in approving or condemning particular transit privileges has pointed out the difficult decisions involved. In *Transit on Cottonseed at Quanah, Texas, supra*, for example, the Commission noted, in denying the privilege there sought which would have involved a complete change of the form of the commodity in transit that to "express the ideal, the identical commodity, in its original or other closely identical form, should move from the transit point" (232 I. C. C. 183 at 188). In the same case the Commission noted as a general principle that as "most of the industries that now have transit grew up under that system, its denial would be detrimental to them and to the commerce of the nation * * *" (*id.* at 189).

---

[17] As we have noted, the Commission has given formal approval to the present tariff. Nonferrous Metals, 204 I. C. C. 319, 387-389, 404-405 (1934).

Neither the pronouncements of this Court nor the statements of the Commission itself in other cases would allow the casual, arbitrary destruction of an established transit privilege which would result from the approval of the Commission's order in this case. *Cf.* 49 U. S. C. §§ 15a(2), 55; *Atchison T. & S. F. Ry.* v. *United States*, 284 U. S. 248 (1932).

Although it is perhaps not strictly necessary to the argument, it should be added that, had the Commission made a detailed study to determine whether the in-transit arrangements here involved should be approved, it could scarcely have reached any conclusion other than that the present sampling-in-transit provisions continue to be wholly desirable. They conform, of course, to the two criteria mentioned by the Commission itself in *Transit on Cottonseed at Quanah, Texas, supra.* No change takes place in the form of the ore at the transit point. And the present in-transit provisions have been in effect as long as the industry itself (R. 646). They have a real value to all concerned, including the carrier. Indeed, they are vital to the whole nonferrous mining industry; sampling and subsequent routing of the sampled ore to the most appropriate smelter are integral parts of mining operations in Utah, especially the operations of the small operators who do not have facilities to do their own sampling. The present provisions make possible the processing of the ore at the plant most adapted to the particular grade or type shipped (R. 646).

Moreover, this Court should consider this importance of the present tariff arrangements to the industry in the context of what the Court may well judicially note—the depressed conditions existing in nonferrous mining. The brief in this case of the intervenor, Utah Mining Association, shows that the increased costs and the depletion of high-grade ore have resulted, not only in the closing of

many marginal mines, but in lowered profit opportunities even for those remaining. This Court should not permit the present difficulties of the industry to be increased and intensified by the removal of the sampling-in-transit provisions which have become increasingly important to the industry as the depletion of high-grade ore continues.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment below is correct and should be affirmed.

CHARLES A. HORSKY
PAUL B. CANNON
HERBERT R. SILVERS

February 1950.

Of Counsel:
COVINGTON, BURLING, RUBLEE,
O'BRIAN & SHORB,
Washington, D. C.